[2021] UKFTT 0345 (TC)

TC08279

Appeal number: TC/2016/01479
and TC/2018/07912

PROCEDURE – strike out application - barring applications – costs application – all refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Monday 7 September to Wednesday 10 September 2020

Having heard Michael Upton and Timothy Haddow, for the Appellant

Andrew Webster QC and Ms Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

104. Following a hearing on 24 and 25 April 2019, I issued Directions of consent ("the April Directions") in relation to case management in this appeal. Directions 3, 4, 5 and 6 are relevant in regard to this hearing. They read:-

> 3. By no later than noon on 24 May 2019, HMRC shall lodge with the appellant and the Tribunal:
>
> (a) Confirmation of HMRC's stance as to whether or not the Undertaking is governed by either Scots or English law in respect of both its construction and effect.
>
> (b) In the event that HMRC agree that Scots law is the applicable law, a submission addressing the issue as to whether the Appellant's argument that it is both relevant and admissible to lead expert evidence of Scots law to determine the factual basis (ie is Scots law in the forum for these appeals foreign law?).
>
> 4. In the event that there is no dispute as to the matters referred to in Direction 3 above, by no later than noon on 7 June 2019, the parties shall lodge with each other and the Tribunal, dates to avoid for a preliminary hearing for a minimum of two days and that within the period July to September 2019. That hearing will be the forum to debate the preliminary argument as to whether or not the appellant has title and interest to enforce the Undertaking.
>
> 5. In the event that there is a dispute as to either or both of the matters referred to in Direction 3 above, by no later than noon on 7 June 2019, the parties shall lodge with each other and the Tribunal, dates to avoid for a preliminary hearing for a minimum of two days and that within the period July to September 2019.
>
> 6. Any party may apply at any time for these Directions to be amended, suspended or set aside.

2. This hearing is the much delayed preliminary hearing referred to in Direction 5. I say that because it had been strenuously argued for the appellant that the focus of this hearing was simply whether or not the appellant has title and interest to enforce the Undertaking. For that reason, on 25 August 2020, Mr Upton intimated that he wished to lead expert evidence at this hearing and if there were to be any opposition to that he would move the Tribunal to hear the evidence under reservation of any issue of admissibility.

3. HMRC did object to that and, on 31 August 2020, I intimated that that would be considered as a preliminary matter at the hearing.

4. I had an electronic bundle of authorities extending to some 1400 pages lodged by the appellant and that was supplemented on the day by a further bundle of authorities taking that to 1,619 pages. HMRC had lodged in process two Bundles of Authorities extending to 889 pages. I had a hearing Bundle extending to 46 tabs and 433 pages which were supplemented by a further three bundles of documents extending to a further 109 pages of documents. Both parties had lodged extensive Notes of Argument.

Procedural Background for this Hearing

5. On 22 May 2019, HMRC lodged what the appellant describes as a "purported" response to Direction 3(a).

6. HMRC opened their Submission dated 22 May 2019, narrating Direction 3 at paragraph 1 but went on to state at paragraph 2:

> "Before addressing the specific questions posited by the Tribunal, HMRC submit there is also a further point that arises which has not been specifically raised in the current Directions, and which in HMRC's respectful submission, ought to be drawn to the attention of the Tribunal and the Appellant as it concerns the Tribunal's jurisdiction."

In summary, HMRC argued that the appellant's wish to rely on the Undertaking was predicated on an argument as to legitimate expectation and the Tribunal had no jurisdiction in that regard. If it were to be established that the Tribunal had no jurisdiction then, the questions posed in Direction 3 "do not arise" but in order to comply with the Directions at paragraph 15 they explicitly stated:

> "…Nevertheless, in compliance with the Directions, and in order to assist the Tribunal, HMRC's response is as follows:
>
> a In answer to the question that Direction 3(a). HMRC submit that the appropriate law to apply is that of English law ….
>
> b Given the answer in respect of Direction 3(b) the necessary precondition (requiring an agreement from HMRC that Scots law were to apply) has not been satisfied, HMRC are not required to provide a response.".

7. The Submission concluded with an application for strike-out on the basis of no jurisdiction and if that were not to be granted, the preliminary hearing should determine the issue of jurisdiction.

8. On 24 May 2019, the appellant lodged a barring application on the basis that:-

(a) HMRC had failed to comply with the April Directions;

(b) They had failed to co-operate; and

(c) There was no reasonable prospect of HMRC's case succeeding.

The reasoning underlying those points was set out at some length but re-iterated later (see paragraph 10 below).

9. On 12 June 2019, HMRC responded pointing out that they had complied in full with the April Directions and that in terms of Direction 5 the preliminary hearing should proceed because the parties were in dispute as to the legal effect of the Undertaking. They requested that the barring application should be dismissed.

10. I directed that the appellant lodge a response thereto. On 7 August 2019, the appellant lodged a Submission amplifying their arguments in the barring application to the following effect:

(a) To raise a question of jurisdiction at this point is an abuse of process when the preliminary procedure had already been decided.

(b) HMRC had previously, and unsuccessfully, applied to have the appellant's reliance on the Undertaking struck out on jurisdictional grounds in 2017 and that decision[1] ("the 2017 Decision") had not been appealed.

(c) There is binding Upper Tribunal authority that HMRC are wrong and that is to be found at paragraphs 30-38 in *Spring Salmon & Seafood Ltd v HMRC*[2] ("the Upper Tribunal Decision").

[1] [2017] UKFTT 65 (TC)

[2] [2016] UKUT 0313 (TCC)

(d) The appellant has at no stage advanced an argument on legitimate expectation. Their argument is entirely based on the Scots private law of unilateral obligations.

11. The appellant concluded by stating that their barring application should now be treated as a response to the strike-out application but that in any event the strike-out application should be dismissed without a hearing.

12. I directed that HMRC respond to that and on 9 September 2019, HMRC responded on the basis that the appellant's objections to HMRC's application were not "obviously correct", as averred by the appellant, and that therefore the question of jurisdiction should be determined at a hearing. Their arguments were:-

(a) Although it is a matter of regret that the question of jurisdiction was not raised at the April 2019 hearing, there was a change of both solicitors and counsel between the hearing and the response to the April Directions. The matter was identified and included in the response to the April Directions in order to enable the Tribunal to consider all potential issues relevant to the Undertaking at the same time.

(b) The threshold for establishing abuse of process is a high one and the fact that a matter could, and even should, have been raised at an earlier stage does not make raising it at a later stage abusive. Preliminary issues were still in play in this appeal.

(c) In respect of *res judicata*, the 2017 Decision dealt with an application under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") but this application is brought under Rule 8(2)(a) of the Rules (a copy of Rule 8 is annexed at Appendix 1).

(d) As far as the Upper Tribunal Decision was concerned, the issue of jurisdiction was not considered by either the FTT or the Upper Tribunal. Therefore the Upper Tribunal Decision that the appellant was entitled to rely on the Undertaking is not, and cannot be, binding authority in respect of jurisdiction because that issue was not before it.

(e) Whilst the appellant argues that it is not running a legitimate expectation argument, nevertheless it is relying on an ex-statutory reason as to why it is not liable to the tax at stake and the FTT being a creature of statute does not have jurisdiction to entertain such an argument.

13. On 15 October 2019, the appellant's solicitor emailed the Tribunal reiterating that the issue of jurisdiction should be decided on the papers but arguing that if jurisdiction were to be considered at a hearing then it should be a four day hearing instead of a two day hearing. It was listed for a four day hearing.

Scope of the Hearing

14. In his Skeleton Argument, Mr Upton had identified 6 issues in the following terms which fell to be addressed, namely:

"Issue 1. Whether the respondents' objection to the appellant's reliance on the 2010 Undertaking is an abuse of process? *If the answer is 'Yes', then Issue 2 arises; if it is 'No', then the next question is Issue 3, as the Tribunal's Direction of 26 April 2019 stated.*

Issue 2. Does the Tribunal have jurisdiction to enforce the Undertaking? *If the answer is 'Yes', then the next question is Issue 3; if the answer is 'No', then the Tribunal is asked to fix a full hearing on the remaining issues in the appeals.*

<u>Issue 3</u>. Is the proper law of the Undertaking English or Scots? *If the answer is 'English' then the next question is Issue 6. If the answer is 'Scots', then the next question is Issue 4.*

<u>Issue 4</u>. **In the Tribunal is Scots law (a) a matter of judicial knowledge or (b) a matter on which evidence is admissible?** *If the answer is (a), then the next question is Issue 6. If the answer is (b), then the next question is Issue 5.*

<u>Issue 5</u>. Is that evidence to be heard (a) at this hearing or (b) at a further hearing? *If the answer is (a), then the next question is Issue 6 and the appellant will lead that evidence at this hearing. If the answer is (b), then the Tribunal is asked to fix a further hearing at which that evidence may be led.*

<u>Issue 6</u>. On the basis of either such evidence and submissions, or submissions only (depending on the answer to Issue 4) has the appellant title and interest to enforce the Undertaking? *Whether the answer is 'Yes' or 'No', having determined it, the Tribunal is asked thereafter to fix a full hearing to hear the appeals in accordance with the Tribunal's determination of these issues.*"

15. HMRC helpfully addressed the same issues in their Skeleton Argument.

16. At the outset of the hearing, Mr Upton rehearsed the procedural history, identified these six issues, argued that because HMRC had only very recently conceded in their Skeleton Argument that Scots law applied there had been non-compliance with the April Directions in the face of an Unless Order and he therefore made an oral barring application. That did not relate to the totality of the proceedings but rather, he sought an Order prohibiting HMRC from debating the preliminary argument as to whether or not the appellant has title and interest to enforce the Undertaking.

17. He argued that was a "reasonable and modest sanction".

18. He made an application for costs.

19. He argued that HMRC had known about the expert evidence since January 2019 when it had been lodged in process. His expert was available to give evidence under reservation.

20. Mr Webster argued that the Tribunal not only could, but should, hear arguments on jurisdiction.

21. He still opposed the leading of expert evidence at this hearing, as the question posed in Direction 3(b) ("the 3(b) issue") still fell to be decided. If he was unsuccessful in relation to the 3(b) issue then he would make an oral application to lodge a witness statement from an expert in relation to the law on the Undertaking.

22. Even, if he was unsuccessful on the 3(b) issue, all expert evidence should be heard in the substantive hearing.

23. I decided that, insofar as possible, all outstanding preliminary issues should be argued at this hearing and reserved the decision on the hearing of expert evidence until I had heard argument on the 3(b) issue.

24. I did not permit consideration of the costs application since it did not in any way conform to the requirements of Rule 10 of the Rules.

Oral Barring Application

25. Mr Upton had some interesting arguments.

26. His starting point was that as, in the Skeleton Argument, HMRC had agreed that Scots law applied, Direction 4 came into play. In support of that, he relied on paragraph 20 of HMRC's Skeleton Argument where HMRC, having described Directions 3 and 4, had said in parenthesis:

> "The hearing for which this Skeleton Argument is produced is in effect the hearing contemplated on 26 April 2019 for the determination of the preliminary issue of whether the Undertaking can be relied upon."

In his view, therefore, HMRC were debarred from arguing the 3(b) issue as it was clear that this hearing was clearly the forum for discussion of what he described as the "title and interest issue".

27. He argued that HMRC could have applied to vary the April Directions but had not done so and they had not lodged a Submission addressing the 3(b) issue by 24 May 2019. Since HMRC had not complied with Direction 3, in the face of an Unless Order, they should therefore be barred from debating the title and interest issue.

28. Firstly, even if the appellant is correct about the argument in relation to HMRC's paragraph 20, what a party states in a Skeleton Argument certainly does not bind the Tribunal in terms of the scope and extent of any hearing. Secondly, and far more pertinently, it was I who had drafted the April Directions and I am very clear as to what they mean and meant.

29. Mr Upton argued that at the Hearing in April 2019 the parties had had a "detailed and conclusive" discussion which had resulted in the April Directions. I disagree (as does HMRC) and I have my notes from that hearing. At the end of the substantive hearing, as is my practice, I asked about how parties wished to progress matters in the event that a barring order were not to be granted. After hearing briefly from Mr Upton, HMRC's then Counsel stated that, as far as the Undertaking was concerned, HMRC needed to review their position and it was possible that the parties might come to an agreement in that regard. If so, then the question as to whether Scots law would be treated as foreign law and therefore a matter for proof would be the next issue; his view was that it was a UK wide Tribunal so it was not foreign law.

30. Mr Upton had then requested new Directions, with an Unless Order, directing HMRC to state whether Scots or English law applied and *esto* whether it was relevant or admissible to lead evidence.

31. It was precisely because of that that the April Directions were drafted in the terms that they were.

32. I find as fact that HMRC did comply with Direction 3(a) because they timeously confirmed that their view was that English law governed the Undertaking (as can be seen from paragraph 6 above). At that stage, Direction 3(b) and Direction 4 therefore became irrelevant. Direction 5 came into play because there was a dispute between the parties in relation to Direction 3(a). This hearing was listed on that basis.

33. It was only when their Skeleton Argument was lodged prior to this hearing that HMRC confirmed that they accepted that Scots law is the proper law of the Undertaking. Accordingly, it was only at that point that the issue in Direction 3(b) comes into play and the key argument as to whether it is relevant and admissible to lead expert evidence of Scots law to determine the factual basis.

34. Furthermore, notwithstanding the quotation from the parenthesis in paragraph 20 of HMRC's Skeleton Argument, paragraph 4 of HMRC's Skeleton Argument states:

> "The legal effect of the Undertaking is for another day (if the Appellant prevails). However in anticipation of the possibility that the Undertaking is capable of being relied upon in the appeal (for whatever effect it might have), secondary issues arises (sic) as to (1) what is the proper law of the Undertaking: English law or Scots law (such as to understand its effect) and (2) what is the manner in which the FTT may take cognisance of it? HMRC accept that Scots law is the proper law of the Undertaking (*c.f.* HMRC submission dated 22 May 2019, §15). However, this does not affect the remainder of HMRC's submissions, especially in relation to the question of the FTT's jurisdiction …".

35. It is quite clear that HMRC did not implicitly or otherwise concede that the 3(b) issue was not a matter for this hearing.

36. I do not accept that, in only conceding the point in relation to Scots law in their Skeleton Argument, HMRC has failed to co-operate with the Tribunal to the extent that matters cannot be dealt with fairly and justly[3]. This is a preliminary hearing. It is right and proper that if a party finds that they have erred in their understanding of a matter that they should intimate that to the Tribunal and the other party. That cannot mean that that would result in them being barred from arguing the agreed *sequitur* to such a concession ie Direction 4.

37. Barring a party from participating would only exceptionally be a "modest" sanction. It certainly would not be in these proceedings not least because, as Mr Upton conceded at the hearing, the title and interest issue is at the heart of the preliminary issues.

38. For the reasons given, I do not accept that HMRC failed to comply with the Directions or that in conceding that Scots law applied to the Undertaking, albeit belatedly, they have significantly failed to co-operate with the Tribunal.

39. I intimated at the hearing, and here confirm, that I do not grant the oral barring application.

Background facts

40. The appellant was incorporated in England in 2004 with the name Spring Seafood Limited and changed to its present name on 23 February 2010. Spring Salmon and Seafood Limited ("SSS") was incorporated in Scotland on 13 March 1998 and changed its name to SSS on 24 April 1998.

41. SSS was struck off the Register of Companies on 8 August 2007 and dissolved by notice in the Edinburgh Gazette on 17 August 2007[4]. At that time HMRC had open enquiries in respect of SSS's accounting periods ended 31 July 2002 to 31 July 2004 inclusive and 31 January 2005. HMRC had previously been aware of a proposal to strike off SSS and it objected to the striking off in May and September 2005 and May and October 2006 pending

[3] Rule 8 of the Rules

[4] Section 1000 Companies Act 2006

the completion of their enquiries into SSS's returns. However, due to what Lord Glennie[5] found to be an administrative oversight, HMRC did not object to the striking off on 8 August 2007.

42. On 22 July 2008, HMRC filed a Petition for SSS's restoration at the Court of Session. That was served on four respondents, namely the Registrar of Companies, the Queen's and Lord Treasurer's Remembrancer, Roderick Christopher Thomas, as the last known director of SSS, and Stuart James Thomas as its last known company secretary. Initially only the Third Respondent, Roderick Christopher Thomas ("Mr Rod Thomas") entered appearance and lodged answers opposing the Petition. He instructed Scottish agents and Counsel.

43. The Record (as amended) stated[6] *inter alia* that:

> "The Third Respondent contends that the principal objective of the Petitioner is to bring pressure on the Respondents to seek a financial settlement by threatening the restoration of the company and a host of costly, onerous, and time-consuming enquiries".

44. On 18 May 2010, Mr Upton wrote to HMRC's then counsel on a counsel to counsel basis stating:

> "… I can advise that I may be instructed to move minutes to sist Sarah Thomas, Rebecca Thomas and Spring Capital Ltd. as party minuters with interests in the restoration of the company. I understand that that is dependent only on completion of money-laundering compliance in order that Russel & Aitken may accept them as clients."

45. HMRC's counsel responded the same day stating:

> "I struggle to understand what interests the possible minuters have in the restoration of the company."

46. A 'By Order' hearing had been fixed for 19 May 2010. At that hearing, the Undertaking was provided in the following terms:

> "UNDERTAKING
>
> As revised by agreement at court 19 May 2010.
>
> That upon the restoration of the Company [SSS] to the Register HMRC will forthwith (that is to say as soon as is practicable within the requirements of the Taxes Acts and applicable regulations and procedures) issue closure notices and assessments in respect of the outstanding enquiries into the Company's liabilities. The Revenue will a) make no further demands of the Company's officers or any other person in relation to the said outstanding enquiries, and b) raise no further enquiries into the Company's trade to the date that ceased, namely 31 January 2005. The Company may appeal any assessments made on issue of the said closure notices, if so advised. Apart from assessments made on the closure of the said enquiries the Revenue will have no power to, and will not, raise any assessments on the Company in relation to the said trade to the said date save on the discovery of fraudulent or negligent conduct on the part of the taxpayer within the meaning of s.29 of the Taxes Management Act 1970, and has no present reason to anticipate making any such discovery or discovery assessment."

47. On 19 May 2010 the Court issued an interlocutor, wrongly dated 18 May 2010, and it records that having heard counsel,

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[5] Paragraph 4(11) [2010] CSOH 117

[6] Page 22, Answer 6, final sentence

> "1. In respect of the fresh undertaking given by Counsel for the Petitioners, Notes that the Third Respondent no longer maintains his claim to have title and interest to oppose based on his averments anent oppression".

48. It went on to allow Sarah and Rebecca Thomas and the appellant to intimate and lodge in process, accompanied by an appropriate motion, proposed Answers to the Petition.

49. Further emails were exchanged between counsel after the Undertaking was provided. In particular, late in the evening on 19 May 2010, Mr Upton emailed the then counsel for HMRC stating that following the discussions that day, Mr Rod Thomas was prepared to withdraw opposition to the Petition and that Sarah and Rebecca Thomas and the appellant would be prepared to take no further steps to enter the process provided amongst other things that HMRC "…will amend the last sentence of (sic) undertaking to the court to include after words 'the company', the words 'or its officers'…will undertake to withdraw irrevocably their amendments in respect of Spring Capital's claims for loss relief under s343 ICTA 1988 and to make no further assessments or amendments in that regard …".

50. On 21 May 2018, the then counsel for HMRC responded stating amongst other matters that:

> "… the Revenue cannot in this proceeding give any undertakings that they will waive the tax due by any person on any basis or limit the exercise of their powers to assess and seek payment of what is properly due.
> The proper approach to all these matters is for the Revenue to exercise their powers according to law in relation to what they perceive to be the proper liabilities of the various taxpayers (including the company) and then for the taxpayers to appeal the exercise of those powers in the proper forum, the First Tier Tribunal, if so advised…
> The Undertaking was offered to allay Mr Thomas' fears regarding the unduly prolonged procedure in relation to enquiries into the company's affairs, not to concede that tax is not due by or not to be pursued from the company or any person."

51. In summary, the appellant was not a party to the proceedings in the Court of Session at the point at which the Undertaking was given and the appellant having been given permission to become a party, HMRC very clearly declined to amend the Undertaking.

52. On 10 June 2010, Lord Glennie heard a motion on behalf of the Messrs Thomas, their wives and the appellant for receipt of a Minute of Amendment for Mr Rod Thomas and for Answers for the other parties to be received late. In his Opinion dated 30 June 2010[7], firstly[8], Lord Glennie recorded that in light of the pleadings and in light of the Undertaking, at the hearing on 19 May 2010, Mr Rod Thomas had "… made it clear that he no longer maintained his claim to have title and interest based on those averments anent oppression".

53. Secondly[9], in relation to title and interest and indeed the relevancy of the parties to oppose the Petition he went on to state:

> "In the present case, the prejudice which the third and fourth respondents (and the other would-be parties) say that they will suffer as a result of the company being restored to the register all stems from the fact that the position will revert to that which prevailed before the striking off. The striking off gave them an advantage, as compared with their position prior to the striking off. The restoration to the register, if the prayer of the petition is granted, will take away that advantage. That is all. I do not consider that qualifies them to object on the basis that they will be directly affected by the restoration.

[7] [2010] CSOH 82

[8] Paragraph 8

[9] Paragraphs 16 and 17

> I would, for that reason, have refused the motions…to be received although late. But I do not need to decide these motions on that basis…I would not have exercised my discretion to allow them [these new points] to be introduced at this stage [very late], unless I had also been persuaded that they were very likely to succeed. This is far from such a case."

54. Lord Glennie granted the Prayer of the Petition on 14 July 2010[10] after proof, and having refused a reclaiming motion from Mr Rod Thomas in relation to the refusal to allow receipt of the Minute of Amendment. A further reclaiming motion having been refused, SSS was restored to the Register of Companies on 16 March 2011. It was subsequently dissolved again, on 13 June 2017.

55. In the interim the appellant had appealed the Closure Notices issued to it for the accounting periods ending 9 March 2005 to 30 April 2009 inclusive. Judge Brannan dismissed those appeals[11] ("the 2015 Appeal") and a subsequent appeal to the Upper Tribunal was also dismissed.[12] The 2015 Appeal had been adjourned in respect of one issue and a further hearing was held to determine that remaining issue, the appeal for which was dismissed.[13] The appellant has been granted permission to appeal that decision, albeit I do not know on what grounds, and the appeal was heard by the Upper Tribunal in November 2020 but the decision has not yet been issued.

56. In the 2015 Appeal, the parties having agreed at a case management hearing that the Undertaking was governed by English law, the appellant sought to rely on the Undertaking. Judge Brannan recorded the argument at paragraph 273 as follows:-

> "The appellant's primary submission was that the Undertaking precluded HMRC thereafter from making enquiries into the quantum of the SSS losses carried forward and utilised by the appellant, pursuant to section 343 ICTA 1998 for periods 2005 onwards. In essence, Mr Thomas submitted that the Undertaking had the effect of preserving the appellant's right to utilise the losses that existed in SSS on the day the Undertaking was given ie 19 May 2010".

57. Judge Brannan went on to consider the Contract (Rights of Third Parties) Act 1999 at paragraphs 276 to 279 before concluding at paragraphs 281 and 282:-

> "281. Paragraph b) of the Undertaking seems to me to relate entirely to SSS's trade. It does not purport to confer any benefit on the appellant. There is nothing which says or implies that HMRC is prohibited from enquiring into the tax affairs of the appellant and nothing which indicates that the appellant was intended to benefit from this paragraph.
>
> 282. Accordingly, I reject the appellant's submission that HMRC are precluded by the Undertaking from enquiring into the quantum of losses available for carry-forward under section 343 ICTA 1988 in all the accounting periods under appeal."

58. In another litigation SSS, in 2014, had appealed determinations and decisions in respect of PAYE and NICs. One of the arguments advanced before the FTT was that HMRC was precluded from raising these as a result of the Undertaking. The FTT rejected this argument and dismissed the appeal.[14]

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[10] [2010] CSOH 117

[11] [2015] UKFTT 66 (TC)

[12] [2016] UKUT 264 (TCC)

[13] [2019] UKFTT 699 (TC)

[14] [2014] UKFTT 887 (TC)

59. SSS appealed to the Upper Tribunal[15] where Lord Glennie stated at paragraph 37:

> "The undertaking was an undertaking given to the Court. It should be construed in the same way as any legal document, adhering as far as possible to the plain meaning of the words used in the way in which they would have been understood by the interested parties. In circumstances such as prevailed at the time the undertaking was given, it cannot have been intended or understood in an unduly technical sense containing traps for the unwary. It seems obvious that the reference to 'outstanding enquiries' was intended to be a reference to be the enquiries into the Company's corporation tax liabilities initiated by the letter of 4 January 2007. That was, I think, common ground between the parties and was the view taken by the FTT. HMRC was allowed to conclude those outstanding enquiries by issuing closure notices and assessments in respect of those outstanding enquiries. All well and good thus far. But I differ from the FTT on what follows from that. … The second sentence of the undertaking contains an undertaking on the part of HMRC to make no further demands of the company or its officers in relation to those enquiries and to raise no further enquiries into the company's trade to that date. So that enquiry into the Company's corporation tax liabilities for those periods … is to be brought to a conclusion without any further demands or enquiries. The final sentence is critical. Apart from any assessments (ie assessments to corporation tax) made on the closure of that enquiry, HMRC will not raise any other assessments in relation to the Company's trade save on the discovery of fraud or negligence – it is not suggested that this exception is relevant. The FTT's argument that "assessments" in this final sentence does not cover a Notice or Determination (for PAYE) or a Notice of Decision (for NIC) smacks of over-literalism. I cannot accept that the undertaking was intended to draw such fine semantic distinctions … The clear intention of the undertaking was that the outstanding enquiry could be brought to a conclusion and then that would be that."

60. Of course in this appeal, and also in appeal TC/2018/07912, the appellant seeks to rely on the Undertaking and now argues that Scots law and not English law is the applicable law.

61. On 22 January 2020, in appeal TC/2018/07912, I issued Directions in terms agreed by the parties but simply endorsed by the Tribunal and Direction 3 read:-

> **3. Joinder in respect of preliminary issue**: If the Appellant amends its grounds of appeal in order to rely on the undertaking given by the Respondents to the Registrar of Companies in the Court of Session in Scotland on 19 May 2010 in relation to the restoration of Spring Salmon & Seafood Ltd, this appeal to be heard at the same time as the hearing in appeal TC/2016/01479 currently listed for 7 to 10 September 2020 in respect of that issue (and only that issue) and to be subject to any directions made by the Tribunal in respect of that hearing in addition to Directions 4 to 13 below.

62. The grounds of appeal were amended to that effect and thus this hearing, insofar as it relates to the Undertaking decides the preliminary issues in that regard for both appeals.

[15] [2016] UKUT 0313 (TCC)

Discussion

<u>Issue 1</u>. Whether the respondents' objection to the appellant's reliance on the 2010 Undertaking is an abuse of process? (*If the answer is 'Yes', then Issue 2 arises; if it is 'No', then the next question is Issue 3, as the Tribunal's Direction of 26 April 2019 stated.)*

63. The appellant advanced four interlinked arguments in relation to abuse of process, namely:

(a) The argument on jurisdiction was being raised at an "inexcusably late stage" as the preliminary issues had been identified in the April Directions after detailed discussion.

(b) HMRC have made no application to amend, suspend or set aside the Directions.

(c) HMRC's response to the April Directions when they raised the question of jurisdiction was more than six and a half years after the appellant had given notice that it required HMRC to respect the Undertaking. That is far too late.

(d) The 2017 Decision had not been appealed and Judge Brooks had refused HMRC's then application to strike-out the appellant's reliance on the Undertaking on jurisdictional grounds.

64. Although I will address all four arguments (and as can be seen I did not find that any of them amounted to abuse of process), I found that there was a compelling reason that there was no abuse of process in raising the issue in May 2019. As I explained to the parties on the morning of the second day of the hearing, in *Carter v Ahsan*[16], a case to which I had not been referred, Mr Justice Rimer stated at paragraph 75:-

> "The authorities to which I have earlier referred show that a party cannot be estopped from questioning a tribunal's jurisdiction and it follows that nor can a party be so estopped by that species of estoppel known as issue estoppel."

and at paragraph 82:-

> "… it is trite law that an objection as to jurisdiction, in the sense understood by Diplock LJ, can be taken at any stage of the proceedings, and not only can but should be taken by the court of its own motion: see for instance per Williams LJ in *Norwich Corporation v Norwich Electric Tramways* [1906] 2 KB 119 at p 125".

65. It is indeed trite law but in the interests of completeness I turn now to the other four arguments.

The first argument

66. There is no doubt that the first time that the issue of jurisdiction was raised was in HMRC's response to the April Directions. There was indeed no discussion about jurisdiction or legitimate expectation in the Hearing. However, as I have explained at paragraph 28 above, I have rejected the appellant's argument as to the basis for the April Directions.

[16] [2005] EWCA Civ 990

67. There was then a change in both solicitor and counsel for HMRC and it was within less than a month of the issue of the April Directions that this issue was raised. That is not inexcusably late in the context of the April Directions.

The second argument

68. I see no reason why HMRC should have had to seek to amend or suspend the April Directions. They complied with Direction 3(a) in stating that English law applied. As I have already said, that then meant that Direction 5 came into play and a further hearing was required. Notwithstanding the appellant's initial argument[17] that it was not clear from the response whether that response was an application for strike out, it was, and is, clear to me that that was precisely what it amounted to. Although it did not refer to the Rules, paragraph 17 of HMRC's Submission is explicit and reads:

> "However, that issue only arises if the Tribunal determines that the issues of jurisdiction are to be resolved in the appellant's favour, and to that end, given the binding authority of this Tribunal, HMRC submit that:
>
> (a) The claim based on legitimate expectation should be now struck out as it is not open to the Tribunal (irrespective of whether it sits in Scotland or in England & Wales) to deal with that matter;
>
> (b) Alternatively, that if the matter is listed for a preliminary hearing between July and September 2019, that the issue of jurisdiction needs to be determined as well so that the Tribunal can issue a decision in respect to it."

The third argument

69. As long ago as April 2017, HMRC, having applied for certain appeal grounds to be struck out on the basis that they had no reasonable prospect of success because they constituted an abuse of process, lodged submissions on the subject of the Undertaking. The appellant duly responded in May 2017 and sought leave to amend the grounds of appeal. In summary, the appellant having raised the applicability of the Undertaking as a defence to HMRC's strike-out application, then successfully sought to have the Undertaking added to the substantive appeals as a separate appeal ground. Mr Upton argues that that would have been the obvious point at which to have raised the question of jurisdiction.

70. It is argued that on 5 June 2017, Judge Brooks issued a decision on those submissions and therefore HMRC cannot now renew their argument.

71. Furthermore, on numerous occasions thereafter, the subject of the Undertaking arose but no argument was advanced on jurisdiction.

72. Whilst all that Mr Upton says in this regard is accurate, and Mr Webster concedes that it is regrettable that the point was not identified earlier, nevertheless the basic points are that:

(a) jurisdiction can and should be raised at any time,

(b) had HMRC not raised it at this juncture, it is conceivable that the Judge in the substantive hearing might have done so and in terms of the Rules and applicable law would be quite right, and indeed obliged, to do so, and

(c) the issue was raised as soon as the new counsel and solicitor were instructed and identified the point.

It is not far too late.

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[17] Paragraph 7.2 Barring Application dated 24 May 2019

The fourth argument

73. Judge Brooks did not address lack of jurisdiction in the sense of Rule 8(2)(a) as that was not argued before him either orally or by way of written submission. He did consider Rule 8(3)(c) which provides for strike out if "…the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding". HMRC had there argued in relation to the Undertaking that Judge Brannan had already decided that the appellant was not entitled to rely on the Undertaking and therefore could not now succeed on that point.

74. Judge Brooks refused the application *inter alia* on the basis that before considering the prospects of success he had to decide whether in seeking to rely on the Undertaking the appellant was engaging in abuse of process. He decided that it was not because "…it was clearly not possible for Judge Brannan to have regard to the views of Lord Glennie in *Spring Salmon & Seafood Limited,* almost 18 months after his decision was released." That is quite different to the argument now before the Tribunal.

Conclusion on Issue 1

75. Since I have not found that there is an abuse of process by HMRC on any ground, I now move to Issue 3 as suggested by Mr Upton.

<u>Issue 3</u>. Is the proper law of the Undertaking English or Scots? If the answer is 'English' then the next question is Issue 6. If the answer is 'Scots', then the next question is Issue 4.

76. It is now a matter of agreement between the parties that the proper law of the Undertaking is Scots law so I now move to Issue 4.

<u>Issue 4</u>. **In the Tribunal is Scots law (a) a matter of judicial knowledge or (b) a matter on which evidence is admissible?** If the answer is (a), then the next question is Issue 6. If the answer is (b), then the next question is Issue 5.

77. Mr Uptons' first argument before this Tribunal was that the treatment of Scots law in these proceedings "…raises a basic question about the constitutional relationship of the English and Scots Tribunal systems".[18]

78. Mr Upton started with the Union with Scotland Act 1706 and the Union with England Act 1707 and relied on Campbell, LJ in *Stuart v Marquis of Bute*[19] where he said:

> "…as to judicial jurisdiction, Scotland and England, although politically under the same Crown and under the supreme sway of one united Legislature, are to be considered as independent foreign countries, unconnected with each other."

and Lord President Inglis in *Orr Ewing's Trustees v Orr Ewing*[20] where he said that:

> "…the judicatories of England and Scotland are as independent of each other within their respective territories as if they were the judicatories of two foreign states."

[18] Paragraph 75 Skeleton Argument

[19] (1861) 11 ER 799 at 805

[20] (1884) 11 R 600

and Lord Blackburn in *Orr Ewing's Trustees v Orr Ewing*[21] where he stated that only legislation could change that analysis.

79. By contrast Mr Webster argued that the Tribunal has a UK wide jurisdiction as confirmed by section 26 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") which reads:

> "**26**. Each of the First-tier Tribunal and Upper Tribunal may decide a case—
>
> (a) in England and Wales,
> (b) in Scotland, or
> (c) in Northern Ireland,
>
> even though the case arises under the law of a territory other than the one in which the case is decided."

and he referred me to the Dissenting Opinion (but not in this regard) of Dr Poon (as she was then) in the FTT decision in *Murray Group Holdings and others v HMRC*[22] ("Murray") where she referenced this section and recorded that the parties had agreed that the FTT is a UK Tribunal and English law would not be treated as foreign law as the appeal could have been heard in England.

80. I understand Mr Upton's suggestion that section 26 is simply a matter of practical convenience but does not affect the applicable law. That is reinforced by the heading which reads: "26.First-tier Tribunal and Upper Tribunal: sitting places." However, that is not the end of the matter. It is undoubtedly the case that I, a Scots law qualified Judge, could have been sitting in London hearing this case just as Judge Brooks, an English law qualified Judge, sat in Edinburgh for the hearing for the 2017 Decision. It is not the site of the hearing that matters but the fact that any Judge (and non-judge members) of the Tribunal are eligible to decide matters within the Tribunal's jurisdiction throughout the UK. See sections 4 and 147 TCEA.

81. I note, but disagree with Mr Upton's argument that the TCEA made no material change.

82. It is clear from the criteria issued by the Judicial Appointments Commission that Judges qualified in any part of the UK can sit in any part of the UK.

83. There are no territorial stipulations or limits in the Tribunal Rules.

84. There are no territorial stipulations or limits in the Senior President's Practice Statement "Composition of Tribunals in relation to matters that fall to be decided by the Tax Chamber of the First-tier Tribunal and the Finance and Tax Chamber of the Upper Tribunal on or after 1 April 2009" ("the Composition Practice Statement")[23].

85. Edward Jacobs is the very well respected author of *Tribunal Practice and Procedure, Tribunals under the Tribunals, Courts and Enforcement Act 2007* ("Jacobs") and at paragraph 1.12 he states:

> "The current priority is to find ways of reconciling the political aspiration for devolution and the practical problems of operating jurisdictions that apply across national boundaries within the United Kingdom."

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[21] (1885) 13 R (HL)

[22] [2012] UKFTT 692 (TC) at paragraph 10

[23] Lord Justice Carnwarth, 10 March 2009

86. In *Murray* when it reached the Inner House of the Court of Session[24] Lord Drummond Young, under the heading "Treatment of English law" stated:

> "[49] The third preliminary issue is the manner in which the Inner House should deal with the questions of English law in hearing an appeal from the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007. Normally English law, like any legal system other than Scots law and other systems such as the law of the European Union that had been incorporated into Scots law, is treated as foreign law, which is a question of fact and must be established by evidence. In the absence of evidence or agreement between the parties, it will be presumed that foreign law is the same as Scots law. In the present case, however, proceedings were initiated in the First-tier Tribunal and the first appeal was heard in the Upper Tribunal. Both of those tribunals have United Kingdom-wide jurisdiction, and it is agreed between the parties that both of them have judicial knowledge of English law. In the event of an appeal from the Inner House to the United Kingdom Supreme Court, that court too has judicial knowledge of English law. The critical question is whether in that structure of tribunals and courts the Court of Session has judicial knowledge of English law.
>
> [50] In our opinion it has such judicial knowledge. The result otherwise would be highly artificial. The lower tribunals would have judicial knowledge of English law; the court to which a final appeal may be taken would have judicial knowledge of English law; but this court would be constrained by the findings on English law of the First-tier and Upper Tribunal. We cannot believe that that was the intention when the structure of appeals in sections 11-14 of the 2007 Act was set up. We do not think that this will give rise to any practical difficulties. The basic legal concepts of Scots and English law, in this case the Trust, the contract and the loan, are broadly similar. No doubt the theoretical nature of a Trust is different … Nevertheless the practical results are similar, and the institution of the Trust fulfils similar functions in both jurisdictions. Consequently Scottish judges should not have any great difficulty in understanding English law, and are expected to do so in the Upper Tribunal and the UK Supreme Court. Moreover, it can be expected that the parties will present careful and informed submissions on English law, as occurred in the present case, and the Court of Session will obviously check submissions against the cases and textbooks that are referred to. Finally, we note that in *IRC v City of Glasgow Police and Athletic Association*, 1953 SC (HL) 13, it was held that the Court of Session could take judicial notice of the English law charity where that became relevant to liability for income tax, in accordance with the earlier decision in *Commissioners for Special Purposes of Income Tax v Pensel* [1891] AC 531. Although that decision it is not directly in point, because of the result of the decision in *Pensel's* case was that Revenue purposes the English law of charity became part of Scots law, it points to the fact that there is no objection in principle to the Scottish courts' taking judicial notice of English law".

87. I have included the full quotation because it was argued for the appellant that the question of the Tribunal's jurisdiction, as opposed to that of the Inner House, was not in dispute in that case and they had proceeded on that basis because there was admittedly a broad similarity in respect of the underlying law of trusts in both England and Scotland.

88. Whilst I agree with that proposition, nevertheless Lord Drummond Young unequivocally pointed out that the Tribunal has UK wide jurisdiction so we are certainly not dealing with separate English and Scots Tribunal systems as averred by the appellant. Mr Upton argued that this Tribunal was similar to the Employment Tribunal. As I stated in the hearing and reiterate here, it is not. The First-tier Tribunal (Tax Chamber) is UK wide. There are distinct Employment Tribunals for Scotland and for England and Wales.

89. What we are dealing with here is one UK wide system under TCEA and the very important section to consider is section 13 from subsection (11) which reads:-

> "(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
>
> (12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—

[24] 2015 CSIH 77

(a) the Court of Appeal in England and Wales;
(b) the Court of Session;
(c) the Court of Appeal in Northern Ireland,

(13) In this section except subsection (11), 'the relevant appellate court', as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).

(14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

(15) Rules of court may make provision as to the time within which an application under subsection (4) to the relevant appellate court must be made."

90. The highly respected and often quoted commentary on that states in the relevant Note to that section[25] as follows:-

"The Upper Tribunal must specify the relevant appellate court even if it refuses permission to appeal, so that the applicant knows to which court to renew the application. In a social security case, the relevant appellate court will generally be where the claimant lives but there is a considerable element of discretion where there are more than two parties or where the claimant has moved. **Relevant considerations are likely to be the convenience of the parties and whether the case raises a point of law where the law may not be the same in all parts of the United Kingdom."**

91. I have highlighted in bold the key point. As far as the Tribunal is concerned it has a UK wide jurisdiction and, since an appeal can only be on a point of law, it will have dealt with the relevant law in the FTT and the UT wherever the sitting took place. That is the point Lord Drummond Young made in *Murray*.

92. Mr Upton relied on Laws LJ in *Marshalls Clay Products Ltd v Caulfield*[26] ("Marshalls") where he stated:

" …it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any Court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or most assuredly vice versa".

93. I agree entirely with that quotation but that is not the point in issue here. The issue here is whether Tribunal Judges and Members are considered to have judicial knowledge of Scots, English, Welsh (Land Transaction Tax) and Northern Irish law.

94. I, like many other Judges in the FTT, regularly sit in all corners of the United Kingdom. Although I am qualified in Scots law I am deemed to have knowledge of the underlying law in each part of the UK, be it trusts, partnerships, land etc and there are significant variations in many regards eg the requirement in Scotland to have certain documents in writing[27] but not in England.

95. The point made in *Marshalls* is invariably applied. If there is a conflict between a Court of Session decision and a Court of Appeal decision then if I am sitting in Scotland I am bound by the Court of Session decision but if in England then by the Court of Appeal. I, and my fellow Judges are deemed to know both and to know when to apply them. There is overlap as can be seen from paragraphs 26, 33-35 and 43 of *Martland v HMRC*[28] where the Upper Tribunal,

[25] Rowland and Ward

[26] [2004]EWCA Civ 422 at pp1514 H-1515 A

[27] The Requirements of Writing (Scotland) Act 1995

[28] [2018] UKUT 178 (TCC)

dealing with and reviewing English decisions, cited with approval the Court of Session decision by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City*[29]

96. Lastly, I mentioned the *Composition Practice Statement* for good reason. As I told the parties, since this is a specialist Tribunal, the then President of the Chamber in the cases of *Mid Ulster District Council*[30], *Midlothian Council*[31] and *Chelmsford City Council*[32] authorised a special panel of Judges so that expertise could be appropriately deployed in these lead cases. I was the Scottish Judge. Those decisions have been issued. Judge Kempster described the composition of the Tribunal as follows in each decision:

> "7. In case management of the appeals (of which there is a large number) it was directed that:
>
> (1) Consideration may need to be given to the statutory provisions relating to local authorities in the constituent parts of the UK, which vary by jurisdiction.
>
> (2) A single lead case (Tribunal Procedure Rule 5(3)(b) refers) should be identified for each of the three territorial jurisdictions: England & Wales, Scotland and Northern Ireland.
>
> (3) The nominated lead cases were Chelmsford City Council (TC/2011/7844) for England & Wales; the Appellant for Scotland; and Mid Ulster District Council (formerly Magherafelt District Council) (TC/2011/687 & TC/20102/9253) for Northern Ireland.
>
> (4) The Tribunal panel to hear all three lead appeals would consist of three Judges, together qualified in the three jurisdictions. The then Chamber President confirmed the panel as constituted, and nominated Judge Kempster as the presiding member (Senior President's Practice Statement of 10 March 2009, paras 7 & 8, refers).
>
> (5) For administrative reasons, the appeal of Mid Ulster District Council would be heard first, followed by a hearing of the other two lead cases together. The Tribunal's decisions on the three appeals would be released together."

97. As can be seen from that there was no question of there being any possibility of the different legal provisions being foreign law. Of course that is a FTT decision, and is not binding upon me, but as it bears the *imprimatur* of the then President of the Chamber it is extremely persuasive.

98. As a footnote, and I do not criticise in any sense, I was interested to note that at paragraph 9 in the 2017 Decision, Judge Brooks noted that Mr Upton, appearing before a English law qualified Judge in Edinburgh, accepted "…that the Tribunal has a UK wide jurisdiction [and] made the point, especially as the hearing was in Edinburgh, that there was no Scottish authority to support…". There was no suggestion that the English law that was being debated would have to be established as a matter of foreign law.

Conclusion on Issue 4

99. In summary, I find that this is a UK wide Tribunal and Scots law is a matter of judicial knowledge. The question of admissibility of evidence and therefore the expert witness does not arise.

100. However, I have had regard to Rule 2 of the Rules. I consider it sensible to address that issue at this juncture given that it was implied that if I did not find for the appellant then that issue might be appealed and further that there was the possibility of another costs application.

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[29] [2006] STC 1218

[30] [2020] UKFTT 434 (TC)

[31] [2020] UKFTT 433 (TC)

[32]

Expert evidence

101. Mr Upton argued that, the matter having been raised by HMRC in a letter of 7 September 2017, Judge Brooks issued Directions on 9 October 2017 and Direction 9 read:

> "The parties may (if so advised) rely on expert evidence provided any such evidence complies with part 35.10 of the Civil Procedure Rules."

102. In the Note lodged by the appellant for the hearing on 24 July 2018, the appellant intimated that it might wish to lead an expert witness on Scots law with regard to the Undertaking. I observe that the clear implication of that Note is that any such evidence would be led at the substantive hearing.

103. Following the hearing on 24 July 2018 I issued Directions, again indicating that the parties may (if so advised) rely on expert evidence. Again, it was anticipated that any such evidence would be led at the substantive hearing.

104. On 11 January 2019, the appellant lodged in process the Opinion of the Senior Counsel on points of Scots law by Alan W D McLean QC. (In passing, I observe that the Letter of Instruction which apparently contains some additional background information and the two questions upon which the Opinion was sought has not been lodged in process. It should be).

105. HMRC raised no objection although, on 21 December 2018, they had lodged with the Tribunal an application seeking to exclude expert accountancy evidence for the appellant.

106. Argument on, and a decision about, expert accountancy evidence is still pending. In the event that I am wrong about Scots law being within judicial knowledge, then I do not accept Mr Upton's argument that it is too late to permit HMRC to instruct an expert on Scots law. He had argued that it was anticipated that this hearing would be an evidential hearing unless the question of title and interest was not to be argued by HMRC and HMRC had had more than enough time to instruct an expert. I disagree.

107. Firstly, and obviously, if I am correct in stating that it is a matter of judicial knowledge there is no reason why HMRC should have been put to the expense of instructing an expert if that were likely to be proven to be otiose. If I am wrong then that is the time for an expert to be instructed.

108. I observe for the benefit of both parties, in the context of the outstanding accountancy issue (but it is also relevant to the issue of the Undertaking), that the preference in the Tribunal generally, and I agree entirely, is for the Tribunal to appoint one joint expert, with the cost being borne by both parties. The outcome would then be an agreed Statement of Fact(s).

109. I must then turn to Issue 5:

Issue 5. Is that evidence to be heard (a) at this hearing or (b) at a further hearing? If the answer is (a), then the next question is Issue 6 and the appellant will lead that evidence at this hearing. If the answer is (b), then the Tribunal is asked to fix a further hearing at which that evidence may be led.

Conclusion on Issue 5

110. Patently, I heard no evidence at the hearing. Should it ever be necessary to hear evidence then it would be at the substantive hearing.

Issue 6.

111. This issue does not arise since I have heard neither evidence nor submissions. I could not hear submissions because I had not then decided whether Scots Law was within judicial knowledge.

112. The only remaining of Mr Upton's issues is Issue 2, and of course that goes to the heart of HMRC's strike out application. It reads:

Issue 2. Does the Tribunal have jurisdiction to enforce the Undertaking? If the answer is 'Yes', then the next question is Issue 3; if the answer is 'No', then the Tribunal is asked to fix a full hearing on the remaining issues in the appeals.

113. This was not straightforward and the arguments adduced were complex and lengthy. However, at this stage in the proceedings, I know only that the appeals relate to:

> (1) The amendments to the appellant's tax returns for the years ending 30 June 2010, 2011, 2013 and 2014 and the consequential amendment to the appellant's tax return for the year ending 30 June 2012 have been made under paragraph 34, Schedule 18, Finance Act 1998.
>
> (2) The capital loss claim for the year ending 30 June 2012 has been made under Schedule 1A, Taxes Management Act 1970.
>
> (3) The penalties for the years ending 30 June 2007 to 30 June 2009 inclusive have been raised under paragraph 20, Schedule 18, Finance Act 1998.
>
> (4) The penalties for the years 30 June 2010 to 30 June 2012 inclusive have been raised under paragraph 1, Schedule 24, Finance Act 2007.

114. What I do not know are the underlying facts, whether the Undertaking has any bearing on those facts or what the impact of the Undertaking might be in Scots Law.

115. At the hearing Mr Webster made it explicit that, as then advised, he did not accept that the Undertaking was a unilateral obligation; Mr Upton argues that it is. At this juncture I cannot know whether in any sense it is relevant.

116. I have Mr Upton's arguments that the appeal relates to enquiries which are in breach of the Undertaking. I am bound by and wholly agree with the Upper Tribunal, in a different context, in *Edwards v HMRC*[33] where it quoted with approval the FTT's findings in *Qureshi v HMRC*[34] and the relevant paragraph reads:

> "51. The FTT also made the following observations at [14] to [16] with which we would agree:
> …
>
> > "15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

[33] [2019] UKUT 131 (TCC)

[34] [2018] UKFTT 0115 (TC)

117. Mr Upton may be correct but I simply do not yet know the detail in this appeal. Many of Mr Upton's arguments turn on what HMRC apparently might or indeed might not have done. That is a matter for evidence.

118. Of course, I know that the Tribunal has only the powers given to it by statute.

119. However, at this stage, I agree with Mr Upton that I cannot decide on the question of jurisdiction until I have heard at least some relevant evidence to put the Undertaking in context.

Conclusion on Issue 2

120. I reserve judgment on the issue of jurisdiction in relation to the Undertaking.

Decisions

121. Firstly, the appellant's application to bar HMRC on the grounds set out in paragraphs 8 and 10 above is refused. The more limited oral application was refused in the course of the hearing

122. Secondly, HMRC's application to strike out the appellant's reliance on the Undertaking is refused *pro tem.* Of course, HMRC have the right to renew that application once evidence has been heard.

123. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 07 MAY 2021

Appendix 1

Rule 8

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in the proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.